

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

RICHARD WEST and JOSEPH )  
BRUYETTE, individually and )  
on behalf of a class of )  
similarly situated persons, )  
 )  
Plaintiffs, )

v. )

Case No. 2:19-cv-81

)  
MICHAEL SMITH, Vermont )  
Secretary of Human Services, )  
JANE DOE, Vermont Deputy )  
Secretary of Human Services, )  
JAMES BAKER, Interim Vermont )  
Department of Corrections )  
Commissioner, JOHN DOE, )  
Vermont Department of )  
Corrections Health Services )  
Director, in their official )  
capacities, and CENTURION )  
OF VERMONT, LLC, )  
 )  
Defendants. )

**OPINION AND ORDER**

This is a class action brought on behalf of Vermont inmates and detainees who have been diagnosed with chronic Hepatitis C Virus (HCV). The Complaint alleges that, contrary to the prevailing standard of medical care, Defendants have refused to provide available and effective treatment because the treatment is expensive. The Complaint seeks declaratory and injunctive relief so that class members can begin receiving appropriate care.

The Court recently certified the plaintiff class, and Defendants seek to appeal that certification. Before the Court

is Defendants' motion to stay all proceedings while their appeal is pending. Plaintiffs oppose the motion to stay, in part because of the harm that will allegedly result in further delays of proper treatment. For the reasons set forth below, the motion for a stay pending appeal is **denied**.

#### **Factual and Procedural Background**

The Plaintiff class consists of inmates and detainees in the custody of the Vermont Department of Corrections (DOC) who have been diagnosed with chronic HCV. HCV is a highly communicable disease that scars the liver and can cause other severe health issues, including cancer and death. Defendants include officials of the Vermont Department of Corrections and the Vermont Agency of Human Services, as well as the contracted prison healthcare provider, Centurion of Vermont, LLC. The Complaint alleges that Defendants are denying or withholding curative HCV medications from Vermont inmates without medical justification in order to avoid the associated costs.

Plaintiffs filed their Complaint and moved for class certification on May 21, 2019. Defendants opposed the motion for class certification and moved to dismiss the case for lack of jurisdiction. They also moved to stay the case while the motion to dismiss was pending. On March 30, 2020, the Court denied the motion to dismiss, certified the class, and denied the motion to stay as moot. To date, Defendants have not filed an answer or

other responsive pleading aside from the initial motion to dismiss.

Defendants now inform the Court that they are appealing the class certification, and have moved to further stay the case while that appeal is pending.

### **Discussion**

A stay pending appeal is governed by Federal Rule of Civil Procedure 62(d). "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal citation, quotation marks and alteration omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *Id.* at 433-34.

Motions to stay are traditionally evaluated using "four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 425-26 (internal quotation marks omitted); accord *Trump v. Deutsche Bank AG*, 943 F.3d 627, 640 n.23 (2d Cir. 2019). The Second Circuit has "treated these criteria somewhat like a

sliding scale . . . the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (quotations and alterations omitted); see also *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) ("the degree to which a factor must be present varies with the strength of the other factors").

### **I. Likelihood of Success**

In determining Defendants' likelihood of success on appeal, the Court is asked to assess the probability that it has erred. See *Hayes v. City Univ. of New York*, 503 F. Supp. 946, 963 (S.D.N.Y. 1980), *aff'd*, 648 F.2d 110 (2d Cir. 1981). Relevant considerations include "the extent to which the decision is supported by precedent" and "the standard of review that will govern the appeal." *Id.* Success on appeal requires both that Defendants' Rule 23(f) petition for interlocutory appeal is granted and that, upon review, the Court of Appeals decertifies the class. See *Johnson v. Geico Cas. Co.*, 269 F.R.D. 406, 412 (D. Del. 2010); *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 4 (D.D.C. 2002).

#### **A. Rule 23(f)**

Pursuant to Rule 23(f) "[a] court of appeals may permit an

appeal from an order granting or denying class-action certification" upon a timely petition. Fed. R. Civ. P. 23(f). The Second Circuit will only grant leave to appeal where a petitioner demonstrates either "(1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (quoting *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001)). The first category includes "'death knell' cases" where class certification "forces the defendants to settle." *Sumitomo*, 262 F.3d at 138. The second category includes cases in which certification "implicates an unresolved legal issue." The Second Circuit has emphasized that "the standards of Rule 23(f) will rarely be met." *Id.* at 140.

Here, the parties have submitted copies of their Rule 23(f) submissions to the Second Circuit. Briefly stated, Defendants argue that Plaintiffs lack standing—an issue this Court previously addressed and need not revisit. Defendants also submit that there is a Circuit split on one issue, though Plaintiffs counter that the Circuit decisions cited by Defendants are actually in agreement. Finally, Defendants contend that the

Court certified the class without a sufficiently-vigorous exploration of the facts. In this Court's view, none of these arguments offers a legal question about which there is a compelling need for immediate resolution. See *Hevesi*, 366 F.3d at 76.

As to the question of whether the certification order will effectively terminate the litigation, the Second Circuit has explained that in such cases "the class certification order effectively terminates the litigation either because the denial of certification makes the pursuit of individual claims prohibitively expensive or because the grant of certification forces the defendants to settle." *Sumitomo*, 262 F.3d at 138. Here, the class was certified, and Defendants have not argued that certification will force them to avoid further litigation. Accordingly, the Court finds that Defendants have not shown a substantial possibility of success on their Rule 23(f) petition.

**B. Rule 62(d)**

Defendants have also failed to carry their burden for a stay under Rule 62(d). As noted, one consideration when adjudicating a motion for stay pending appeal is the appellate standard of review. A "district court's decision to certify a class will be overturned only if the district court abused its discretion." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997). In addition, "[a] reviewing court must exercise even

greater deference when the district court has certified a class than when it has declined to do so." *Id.*

For the reasons set forth in its ruling, the Court believes that class certification was warranted. Correspondingly, the Court finds Defendants' appellate claims unpersuasive.

## **II. Harm to Parties**

The next factor requires the Court to decide whether the movants will be irreparably harmed absent a stay. Irreparable harm must be "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (internal quotation marks and citation omitted); *accord Nken*, 556 U.S. at 434-35 ("simply showing some possibility of irreparable injury fails to satisfy" this factor). The Court must also consider the harm to other interested parties if a stay is granted. *Nken*, 556 U.S. at 425-26.

Defendants focus on the burden of engaging in discovery, and of litigation generally. Insofar as those efforts may incur injurious costs, "[i]t is well-established by courts in the Second Circuit . . . that the prospect of incurring litigation costs, even if substantial, is not sufficient to constitute irreparable injury." *Strougo v. Barclays PLC*, 194 F. Supp. 3d 230, 234 (S.D.N.Y. 2016); *see also Hammerman v. Peacock*, 623 F. Supp. 719, 721 (D.D.C. 1985) ("litigation costs do not rise to the level of irreparable injury"). The general burden of

litigation is also insufficient. *See F.T.C v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("the expense and annoyance of litigation is part of the social burden of living under government").

Defendants have raised the fact that this case suddenly finds itself in the midst of a global pandemic, and that COVID-19 is particularly challenging for correctional facilities. The Court is sensitive to this issue, to the functional barriers it creates, and to the need for State employees to focus on that event. Nonetheless, a coincident pandemic should not bring this litigation to a full stop, particularly when inmates with HCV may be at heightened risk. The Court therefore finds that Defendants have not carried their burden with respect to the balance of harms that may result from the denial of a stay.

### **III. Public Interest**

Both sides in this case bring forth concerns of public interest. Defendants cite a burden on public resources, while Plaintiffs advocate for consideration of public health and constitutional rights. In that balance, Plaintiffs have the stronger position. *See Ligon v. City of New York*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013) ("[T]he public interest lies with the enforcement of the Constitution."). The court will also consider judicial economy. *See, e.g., Payne v. Jumeirah Hosp. & Leisure (USA) Inc.*, 808 F. Supp. 2d 604, 604 (S.D.N.Y. 2011) (finding



further proceedings in that forum would be "unproductive and incompatible with judicial economy"). Plaintiffs submit that if class certification is reversed, either the Complaint will be amended to address the question of standing, or there will be a remand for additional Rule 23 analysis. In either event, the case will continue and there is no economy to be found in staying the case pending appeal.

### **Conclusion**

For the reasons set forth above, the joint motion to stay all proceedings pending appeal (ECF No. 61) is **denied**. The related motions to file certain submissions under seal (ECF Nos. 64, 69) are **granted**.

Defendants' request for an enlargement of time in which to file an answer or other responsive pleading is granted, and those pleadings shall be filed within 30 days of this Opinion and Order. Within that same time period, the parties shall confer and submit to the Court a proposed stipulated discovery order. In developing that order, the parties shall take into account the present burden the COVID-19 pandemic has placed on state officials, and in particular the Department of Corrections. If the parties are unable to agree on a discovery schedule, they shall submit proposals with supporting memoranda within the same 30-day time period.

DATED at Burlington, in the District of Vermont, this 22<sup>nd</sup>  
day of May, 2020.

/s/ William K. Sessions III  
William K. Sessions III  
District Court Judge